No. 96-1785

Supreme Court, U.S.
FILED
JUN 16 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

DISCON INCORPORATED,

Cross-Petitioner,

vs.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE and BERNARD J. O'REILLY,

Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF CROSS-RESPONDENT BERNARD J. O'REILLY

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Where a Plaintiff asserts a claim under 18 U.S.C. § 1962(c), against a holding company, its subsidiaries and employees alleging racketeering activity arising out of the normal operations of the business:

1. Should the Circuit Court's affirmance of the dismissal of civil RICO claims be sustained, given that Plaintiff's theory of civil liability under RICO as to the non-Petitioner individual Respondent, was based on the interaction between the individual, his employer and related corporations, and given the absence of any alleged predicate acts beyond the corporations' business.

2. Should a Plaintiff's Conditional Cross-Petition for certiorari as to civil RICO claims against a non-Petitioner individual Defendant be granted, notwithstanding that the Circuit Court has remanded in part Plaintiff's antitrust claims against Defendant-Petitioners for trial, and notwithstanding that Plaintiff's RICO claims arise from the same alleged facts.

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COUNTERSTATEMENT OF THE CASE

Cross-Respondent Bernard O'Reilly ("O'Reilly"), joined as an individual civil RICO Defendant before the Unites States District Court, and joined as an appellee before the United States Court of Appeals for the Second Circuit, but not appearing before the court as a Petitioner, respectfully submits this brief in opposition to the Conditional Cross-Petition of Certiorari.

A. Background

Cross-Petitioner Discon Corporation ("Discon") seeks this Court's review of a judgment of the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed in part and reversed in part a judgment of the United States District Court for the Western District of New York dismissing with prejudice Discon's complaint, alleging both civil RICO and antitrust violations, against Petitioners NYNEX Corporation ("NYNEX"), NYNEX Materiel Enterprises Company ("MECo") and New York Telephone Company ("NYT") (collectively the "NYNEX Defendants"). Cross-Respondent Bernard O'Reilly ("O'Reilly") and Robert J. Eckenrode ("Eckenrode") were also named as Defendants in the proceedings below. The Court of Appeals also affirmed the District Court's dismissal with prejudice of Discon's claims against these Defendants.

Discon was in the business of supplying equipment removal services. NYNEX is the parent company of NYT and MECo, among numerous other subsidiaries. MECo acted as a purchasing agent for the NYNEX group of companies. As such, MECo was often involved in procuring equipment removal services for NYT. NYT obtained these services either directly or through MECo. Discon was among the suppliers providing these services to NYT during the mid-1980's.

In 1985 and 1986, both MECo and NYT stopped using Discon's removal services. Instead, they transferred their business to AT&T Technologies, another company which performed removal services for the NYNEX companies. Discon basically alleged that the NYNEX Defendants schemed to inflict higher telephone rates on NYT customers by purchasing removal services from AT&T Technologies at inflated costs. Discon claims that this alleged arrangement was intended to drive Discon, an alleged competitor for the services at issue, out of the market. AT&T Technologies is not a party to this litigation. O'Reilly, an employee of MECo, was joined as a civil RICO defendant with his employer MECo and MECo's parent, NYNEX, essentially on the basis of allegations that O'Reilly participated as a MECo employee in the transactions complained of by Discon.

In its complaint, Discon alleged thirteen causes of action under both federal and state law. Discon's federal claims fell into two categories: (1) alleged violations of the Sherman Act (specifically 15 U.S.C. §§ 1 and 2); and (2) alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (specifically 18 U.S.C. § 1962(b) (c) and (d)). Discon's antitrust claims were not addressed to Defendant O'Reilly.

Discon's RICO arguments can be summarized as follows:

> 1. That NYNEX, MECo and Eckenrode maintained an interest in and control of NYT through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962 (b);[1]

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1. Discon has apparently abandoned this claim, since the ruling of the Court of Appeals on this issue is not addressed in Discon's Conditional Cross-Petition.

> 2. That NYNEX, MECo, NYT, Eckenrode and O'Reilly conducted and participated in NYNEX's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c); and,
>
> 3. That the Defendants conspired and agreed to commit violations of 18 U.S.C. § 1962(b) and (c), in violation of 18 U.S.C. (d).

Discon alleges that O'Reilly engaged in racketeering by *inter alia*, "[seeking] to extort from Discon affirmative misrepresentations" from Discon in furtherance of the alleged racketeering enterprise.

B. The Decision of the District Court

The District Court dismissed Discon's complaint in its entirety, without prejudice, on June 23, 1992. (JA67-JA108).[2] Discon subsequently filed an amended complaint which essentially rehashed the allegations of its initial complaint.

The Defendants moved to dismiss the amended complaint with prejudice pursuant to Fed. Rule Civ. Procedure 12(b)(6).[3] By Order dated June 7, 1995, the District Court granted Defendants' motion and dismissed all of Discon's federal claims,

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2. References to "JA" are to the Joint Appendix filed by the parties in connection with the proceedings before the Second Circuit.

3. In the proceedings below, all Defendants were represented by the law firms of Davis, Polk & Wardwell and Phillips, Lytle, Hitchcock, Blaine & Huber as co-counsel. As the Petition notes (p. ii), O'Reilly is not a Petitioner before this Court. Cross-Respondent O'Reilly retained separate counsel to represent him before this Court, following the filing of the Conditional Cross-Petition.

with prejudice. (52a-53a). The District Court did not retain jurisdiction over Discon's state law claims, and accordingly dismissed those claims without prejudice pursuant to Fed. R. Civ. Proc. 12(b)(1).[4] *Id.* The District Court stated the reasons for its decision in an unpublished opinion. (21a-53a).

1. The District Court's Dismissal of Plaintiff's Sherman Act Claims

The District Court relied on three grounds in dismissing Discon's claims under § 1 of the Sherman Act. First, the District Court held that a purchaser's decision to purchase from one supplier over another does not necessarily amount to an illegal conspiracy in restraint of trade. (*See* 29a, quoting *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980)). Second, the District Court held that Discon's § 1 "horizontal conspiracy" claims were fatally flawed since the NYNEX Defendants were purchasers of the removal services offered by Discon and AT&T Technologies, another provider of removal services, and were thus not themselves competing in that market. (28a-29a). Third, the District Court held that Discon's failure to allege a conspiracy among the Defendants to force sellers to comply with fixed prices also necessitated dismissal of the § 1 claim.

As to Discon's claims under § 2 of the Sherman Act, the District Court held that, since the NYNEX companies were not competitors of Discon in the removal services market, they could not have attempted to monopolize that market in violation of § 2.

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4. Discon has apparently since filed state court litigation against the NYNEX Defendants on these claims. Defendant O'Reilly is not a party to that case.

2. The District Court's Dismissal of Plaintiff's RICO Claims

In addition to dismissing Discon's antitrust claims, the District Court held that the Amended Complaint failed to plead fraud with particularity in support of its allegations of mail fraud, wire fraud and fraud in the sale of securities. (39a). The District Court also dismissed Discon's claim under 18 U.S.C. § 1962(b), holding that there was no evidence that NYNEX, MECo or Eckenrode acquired or maintained an interest in the alleged "enterprise" through a pattern of racketeering activity. (47a-48a).

The District Court also rejected Discon's contention that Eckenrode and O'Reilly "conducted and participated" in NYNEX's affairs through a pattern of racketeering activity. (48a-49a). In support of this ruling, the District Court relied on the common-sense based rule enunciated by the Second Circuit in *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994). In *Riverwoods*, the Second Circuit held that RICO plaintiffs cannot circumvent the statutory requirement that the "persons" involved in a RICO action be separate from the alleged illegal "enterprise" simply "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying out the regular affairs of the Defendant." (48a-49a).

Finally, having rejected Discon's claims under subsections (b) and (c), the District Court held that the Defendants could not have unlawfully conspired to commit violations of those subsections. (49a). Accordingly, the District Court also dismissed Discon's claims under 18 U.S.C. § 1962(d).

C. The Decision of the Court of Appeals

Defendants appealed the dismissal of its federal claims to the Second Circuit Court of Appeals. The Court of Appeals affirmed the portion of the District Court's order dismissing all of Discon's RICO claims, including those against Cross-Respondent O'Reilly, substantially for the reasons expressed by the District Court.[5] However, the Court of Appeals held that the District Court improperly dismissed two of Discon's antitrust claims. (10a-11a, 14a-15a). Accordingly, the Second Circuit reversed the District Court's judgment as to those narrow issues and remanded the matter for further proceedings. (20a).

In affirming the dismissal of Discon's RICO claims, the Second Circuit also applied the common-sense based rule that an "enterprise" and a "person" must be distinct for purposes of subsection 1962(c). *See Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). Specifically, the Court held that

> "a corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity." . . . In *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994) we explained further that the distinctiveness requirement of *Bennett*, may not be circumvented by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying out the regular affairs of the Defendant.

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5. The Second Circuit opinion is published at 93 F.3d 1055 (2d. Cir. 1996). It is also attached as an appendix to the NYNEX Defendants' Petition for Certiorari from the Second Circuit's remand of certain antitrust issues.

(*See* 16a-17a). (Citation omitted). The Second Circuit also upheld the District Court ruling that, in light of the dismissal of Discon's claims under subsections (b) and (c), Discon could not sustain its claims pursuant to subsection (d). (19a-20a).

The NYNEX Defendants filed a motion for reconsideration of the Second Circuit's holding to the extent that it reversed the District Court's decision dismissing the antitrust claims in their entirety. That motion was denied on or about January 7, 1997. (54a-55a). The NYNEX Defendants then petitioned this Court for Certiorari on or about April 3, 1997. Discon's Conditional Cross-Petition for Certiorari was docketed by this Court on May 16, 1997.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

There are several compelling reasons why this Court should not review the Second Circuit's holdings on the issues Discon raises in its Conditional Cross-Petition. Accordingly, even in the event the Court grants the NYNEX Defendants' Petition for Certiorari, Discon's Conditional Cross-Petition should be denied, at least as to Cross-Respondent O'Reilly. As indicated in more detail below, substantive law and procedural concerns make granting certiorari to Discon inappropriate.

I.

AS A NON-PETITIONER, CROSS RESPONDENT O'REILLY IS NOT SUBJECT TO A CONDITIONAL CROSS-PETITION FOR CERTIORARI DOCKETED BEYOND THE TIME HE WOULD BE SUBJECT TO A PETITION FOR CERTIORARI OR A NON-CONDITIONAL CROSS-PETITION FOR CERTIORARI.

As preliminary matter, it is respectfully submitted that O'Reilly is not properly included within the relief requested by the Plaintiff's Conditional Cross-Petition.

O'Reilly was not a Defendant within Discon's antitrust claims. However, since he was named as a civil RICO Defendant with his employer MECo, a common defense was provided for O'Reilly by MECo against Discon's civil RICO claims before the District Court. Similarly, MECo caused a response to Discon's appeal from the dismissal of the civil RICO claims to be jointly filed on behalf of O'Reilly and MECo.

The Second Circuit's affirmance on August 26, 1996 of the dismissal of the RICO claims ended O'Reilly's interest as a party Defendant in the matter. O'Reilly, of course, did not participate in the petition by the NYNEX Defendants for a rehearing on the Second Circuit's reversal the District Court order dismissing two of Discon's antitrust claims, because he was not an antitrust Defendant.

Similarly, because he had no interest, or party standing, on the antitrust issues, O'Reilly did not participate before this Court among the Petitioners seeking a writ of certiorari regarding the antitrust remand issues. The time for seeking further review of the dismissal of O'Reilly as a RICO defendant has otherwise elapsed due to Discon's failure to seek review of the Second Circuit's August 26, 1996 opinion by filing a timely petition to

the Court of Appeals for rehearing, Petition for a Writ of Certiorari, or a timely petition for a writ of certiorari under Rule 13.4.

Under Rule 12.5 a Petitioner, and all others deemed interested and "remaining" parties under Rule 12.6, are fairly put to the jeopardy that the Court may also grant certiorari of a Respondent's issue under a Conditional Cross-Petition, even though the Respondent has let the time for petition or (unconditional) Cross-Petition lapse. In this case, Petitioner was plainly noticed that O'Reilly was neither a Petitioner nor a remaining interested party in accordance with Rule 12.6 (*see* Petition at ii).

It is therefore respectfully submitted that Discon, as Conditional Cross-Petitioner, cannot seek further review as to any claims against non-Petitioner, non-party O'Reilly. Accordingly, the Conditional Cross-Petition should be denied as to O'Reilly, regardless of the disposition as to the other Cross-Respondents.

Given the conditional nature of the cross-petition, it would be remiss not to also note another, more general procedural reasons for declining further review of the order remanding this matter. Non-Petitioner and Cross-Respondent O'Reilly respectfully submits that the record of this matter is based on what were essentially pleading motions before the trial court, and this record is, of course, distinctly ill-suited to for resolution of any issues arising out of the complex fields addressed by both the Petitioners and Conditional Cross-Petitioners. *Cf. Socialist Labor Party v. Gilligan*, 406 U.S. 583, 587-588 (1972).

II.

TO THE EXTENT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS ON THE RICO ISSUES, THIS IS AN INAPPROPRIATE CASE BY WHICH TO RESOLVE THE CONFLICT BECAUSE THE DISMISSAL AS TO DEFENDANT O'REILLY IS SUSTAINABLE UNDER EVEN THE MOST EXPANSIVE FORMULATION OF RICO LIABILITY.

The Second Circuit properly affirmed the District Court's dismissal of Discon's RICO claims against Defendant O'Reilly. As indicated above, the Second Circuit based its holding on the settled principle that RICO "persons" must be sufficiently distinct from the "enterprise" they allegedly maintain in violation of the statute. (18a-19a). This holding is in accord with prior Second Circuit law as enunciated in *Riverwoods Chappaqua supra* and *Bennett, supra*. Based on these prior holdings, the Second Circuit concluded that the NYNEX Defendants (NYNEX, MECo and NYT) were operating as part of a "unified corporate structure", and thus were not separate "persons" engaged in an illegal "enterprise" in violation of RICO. (18a-19a). The Second Circuit also held that this principle applies to employees and agents of the NYNEX Defendants, such as Cross-Respondent O'Reilly. *Id.*

In its Conditional Cross-Petition, Discon contends that the Second Circuit's decision conflicts with the decisions of other circuits. However, it is clear that any tension among the Circuits on this question is ultimately irrelevant to the dismissal of Discon's claims against Defendant O'Reilly. Discon's Conditional Cross-Petition should be denied accordingly.

There is no dispute among the circuits regarding the basic requirement that RICO "persons" be distinct from the RICO "enterprise". Where the circuits might differ is in deciding what

level of distinctiveness is sufficient to satisfy this requirement. As indicated above, the Second Circuit has held that RICO Plaintiffs cannot avoid the distinctness requirement merely by alleging that a corporation, its officers and agents engaged in a RICO "enterprise" simply by virtue of performing the corporation's regular functions. This reasoning was also utilized by the Sixth Circuit in *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367 (6th Cir. 1993). The *Davis* court stated the general proposition as follows:

> A corporation cannot be both the "enterprise" and the "person" conducting or participating in the affairs of that enterprise . . . Under the "non-identity" or "distinctness" requirement, a corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents or members. An organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself.

Id., 6 F.3d at 377. The *Davis* court then applied this principle to affirm a jury verdict against an insurance company under RICO for participating in a scheme perpetrated by a group of its agents. In so holding, the *Davis* court stated that:

> It matters not that [the insurance company] acted through an individual whose distinctness from the enterprise is open to question; what matters is that [the insurance company] itself and the enterprise are distinct.

Id., 6 F.3d at 378.

Discon takes issue with the Second Circuit's application of the "distinctness" requirement to dismiss Discon's RICO claims against the NYNEX Defendants, O'Reilly and Eckenrode. Specifically, Discon contends that the lower courts in this case incorrectly held that Cross-Respondent O'Reilly and the NYNEX Defendants were "guided by a single corporate consciousness" and thus not subject to RICO liability as separate "persons" engaged in an "enterprise". *See* Conditional Cross-Petition at 6. Discon then claims that this holding places the Second Circuit opinion in direct conflict with the decisions of nine other Circuit Courts of Appeals. *Id.* Discon is incorrect in three critical respects. These flaws in Discon's position require that its Conditional Cross-Petition be denied, at least as to Cross-Respondent O'Reilly.

First, Discon mischaracterizes the Second Circuit opinion regarding Cross-Respondent O'Reilly. *See* Conditional Cross-Petition at 6-7. The Second Circuit expressly noted in its opinion that Discon "redefine[d] the enterprise as the 'NYNEX Group' " for purposes of its § 1962(c) claim. (*See* 16a-17a). The "NYNEX Group", as defined below by Discon, consists only of the three corporations (NYNEX, MECo and NYT). (*See* 16a-17a).[6] Accordingly, it was *not* Cross-Respondent O'Reilly who was said by Discon before the Second Circuit to be part of the § 1962(c) enterprise. (*See* 17a- 18a). Consistent with Discon's position, the Second Circuit explicitly held that it was the *three NYNEX companies* that were acting within a unified corporate structure and consciousness. Accordingly, if the Second Circuit ruling on the issue of a single corporate structure and consciousness were held incorrect, the matter would be subject to remand for trial as to the NYNEX Defendants, but not as to the Cross-Respondent O'Reilly, since on appeal Discon did not contend that O'Reilly was part of the NYNEX Group.

6. The "NYNEX Group", as defined by Discon, consists only of the three corporations (NYNEX, MECo and NYT). (*See* 16a to 17a).

Discon's Conditional Cross-Petition never squarely addresses the Second Circuit's holding that agents and employees, such as Cross-Respondent O'Reilly, are not subject to RICO liability under the *Riverwoods Chappaqua* decision, *supra*. Specifically, the Second Circuit opinion states that:

> *Riverwoods* expressly applies to "agents" as well as "employees" so long as those persons act on behalf of the corporation. Although the situation might be different if the defendants were acting outside the scope of their agency, this situation is not presented here.

(18a-19a). No argument has been presented here as to why Cross-Respondent O'Reilly should be subject to liability under § 1962(c), since he was employed by MECo, and was acting within the scope of his employment during the time period in question. This result is further supported by the decision of Fifth Circuit in *Old Time Enterprises, Inc. v. International Coffee Corporation*, 862 F.2d 1212 (5th Cir. 1989). In *Old Time Enterprises*, the court held that, when an alleged RICO violator is a legal entity, the required distinctness:

> . . . is not established merely by showing that the corporation, through its employees, officers and/or directors, committed a pattern of predicate acts in the conduct of its own business.

Old Time Enterprises, 862 F.2d at 1217. Accordingly, since it was not seriously challenged on appeal that O'Reilly was, at most, an employee of MECo acting within the scope of his authority in facilitating the alleged "enterprise," no genuinely certifiable is presented as to his non-liability under § 1962(c).

Discon also overstates the variances among the Circuits. Based on its mischaracterizations of the Second Circuit opinion, Discon contends there is a conflict between the Second Circuit and nine other Circuit Courts of Appeals, making certiorari appropriate to resolve the conflict. However, there is not a significant conflict between the Second Circuit's holding in this case, at least as it concerns Cross-Respondent O'Reilly, and the decisions cited by Discon. Since Discon's Cross-Petition does not present a significant issue for resolution as to Cross-Respondent O'Reilly, this Court should deny Discon's Conditional Cross-Petition as to Mr. O'Reilly.

Discon argues that the Second Circuit opinion is in irreconcilable conflict with decisions of the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits. *See* Conditional Cross-Petition at 6-7 n.2. However, the conflicts Discon alleges, to be extent that they exist, do not affect the propriety of dismissing Discon RICO claims against Cross-Respondent O'Reilly.

As is predictably the case when dealing with matters as fact-sensitive as RICO claims, the opinions Discon cites were decided under widely varying circumstances. None of them should be applied to hold individuals such as Cross-Respondent O'Reilly liable for acts performed solely as the agent of their employer in furtherance of corporate business.

Many of the cases Discon cites in support of its position involve alleged RICO enterprises comprised of partners, owners, sole proprietors or corporate officers allegedly using corporate entities to illegal ends.[7] That is clearly not the case in this matter,

7. *See United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983) (affirming RICO conviction of general partner in limited partnership used to facilitate drug smuggling operation); *Fleischhauer v. Feltner*, 879 F. 2d 1290 (6th Cir.

(Cont'd)

in which Cross-Respondent O'Reilly was a mere employee of MECo, one of the three corporations allegedly comprising an illegal RICO enterprise. There is no allegation that O'Reilly acted as anything other than an employee of MECo in his dealings with Discon.[8] Since there is no proof that Cross-Respondent O'Reilly had any role in directing the illegal "enterprise" which allegedly aggrieved Discon, he cannot be held liable under § 1962(c). Therefore, dismissal of the RICO claims against Cross-Respondent O'Reilly was entirely proper under this Court's holding in *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (holding that a person must have some part in directing the affairs of the alleged enterprise in order to be held liable under § 1962(c)).

(Cont'd)
1989) (holding that a defendant could engage in a RICO "enterprise" with his wholly-owned corporation); *United States v. Robinson*, 8 F.3d 398 (7th Cir. 1993) (affirming conviction of Defendant who engaged in enterprise to defraud franchisor and others through a corporation he controlled); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989) (holding that principal of oil distributor could engage in RICO enterprise with corporation they controlled); *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985) (affirming conviction of sole proprietor who used his business in conjunction with an illegal RICO enterprise); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982) (holding that the founder of a not-for-profit corporation could form a RICO enterprise with the corporation); *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988) rejecting Defendants argument that he could not participate in a RICO enterprise with corporations he formed since they were allegedly "mere extensions of the Defendant); *United States v. Benny*, 786 F.2d 1410 (9th Cir. 1986) (affirming sole proprietors condition for defrauding institutional lenders through his businesses).

8. It is worth noting that Discon's claims are premised on antitrust law as well as RICO. The federal courts have held that the type of intracorporate conspiracy Discon complains of is generally not actionable in antitrust cases. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1982). *Cf. Haraco Inc. v. American Nat. Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

The remaining cases Discon cites as purportedly conflicting with the Second Circuit ruling in this case are also clearly distinguishable. For instance, in *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992), the Ninth Circuit restated the basic distinctness requirement of § 1962(c). *See Id.*, 978 F.2d at 1533-34. Then, following the reasoning of *Benny, supra*, the *Sever* court held that, while a corporation can only operate through its officers and agents, the distinctness requirement of § 1962(c) generally does not defeat claims against corporate employees, *provided* that the corporation is not also named as a defendant. In addition, Discon relies on several other cases in which courts have, after restating the basic distinctness requirement, either dismissed the RICO charges as unsustainable[9], or upheld jury verdicts entered against RICO Defendants based on evidence adduced at trial.[10]

The *Sever* court also held stated that, when the corporation is also a Defendant, the corporation serves as both "the 'person' and the 'enterprise' " for purposes of § 1962(c). *Id.* at 1534. This principle also governed the Third Circuit's decision in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc.*, 46 F.3d 258, 269 (3rd Cir. 1995), which Discon also cites. Since the Plaintiff in *Sever* named as Defendants several individual officers of a corporation as "persons" for RICO purposes, and named the *corporation* as the enterprise, the distinctness requirement

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9. *See Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991) (affirming dismissal of RICO claims against bank officers).

10. *See Davis v. Mutual Life Ins. Co. of New York, supra*, 6 F.3d 367, 377 (6th Cir. 1993) (affirming civil RICO verdict where record was "replete with evidence from which the jury could reasonably conclude" that § 1962(c) distinctness requirement was met). *See also United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987) (affirming criminal RICO conviction where "the evidence manifestly permitted a jury to conclude beyond a reasonable doubt" that the Defendant was liable under RICO).

was satisfied. *Sever*, at 1534. However, the distinctness requirement is *not* satisfied in this case, since both MECo *and* O'Reilly are named as Defendants.

For the reasons indicated above, there is not a significant conflict between the Second Circuit holding in this case, as it concerns Cross-Respondent O'Reilly, and the decisions of other circuits. This Court should deny Discon's Conditional Cross-Petition as to Mr. O'Reilly accordingly.

III.

GRANTING THE CONDITIONAL CROSS-PETITION IS NOT NECESSARY TO CORRECT AN INJUSTICE, SINCE THE SECOND CIRCUIT OPINION IS IN ACCORD WITH SUPREME COURT PRECEDENT AND THE WEIGHT OF AUTHORITY ON THE RICO ISSUES.

The Second Circuit's decision was in accord with this Court's decision in *Reves*, *supra*. As the Court is aware, *Reves* requires a RICO Plaintiff to show that a defendant "person" exercised some degree of management or control over the alleged illegal enterprise in order for liability to attach under § 1962(c). *Reves*, 507 U.S. at 184. In this case, Discon alleges that O'Reilly at most acted to further the improper activities of his employer, MECo. *See* Conditional Cross-Petition at 4. There is no specific allegation that Cross-Respondent O'Reilly in any way exercised the necessary management or control over the alleged "enterprise" in this case.

Based on the foregoing, it is clear that this Court need not review the Second Circuit's ruling in this case in order to prevent an injustice. The Second Circuit applied settled principles in dismissing Discon's RICO claims against Cross-Respondent O'Reilly, and there is no substantial conflict between that

dismissal and the prevailing law in other circuits. Furthermore, Discon is unable to demonstrate that Cross-Respondent O'Reilly exercised any significant level of management and/or control over the "enterprise" which allegedly aggrieved Discon. For these reasons, this Court should deny Discon's Conditional Cross-Petition as to Cross-Respondent O'Reilly.

IV.

THIS COURT SHOULD DENY DISCON'S CONDITIONAL CROSS-PETITION, SINCE DISCON FAILED TO ALLEGE THAT ANY PREDICATE ACTS OF DEFENDANTS CAUSED INJURY TO ITS BUSINESS.

Pursuant to § 1964(c), RICO aggrieved parties must demonstrate that they suffered injury to their business or property due to a violation of RICO. The statute also requires that the injury be the direct and proximate result of the alleged violation. *Holmes v. SIPC*, 503 U.S. 258, 265-70 (1992).

Discon alleges that the alleged wrongful acts of the Defendants harmed them as a telephone ratepayer. The District Court properly dismissed these claims as insufficient, since the rates Discon paid were subject to federal and state regulations. (46a). Discon also alleged predicate acts of obstruction of justice and extortion. (44a-46a). However, Discon failed to sufficiently allege that these alleged predicate acts were the proximate cause of any injuries. Accordingly, the courts below properly decided the matter by dismissing Discon's RICO claims with prejudice.

V.

THIS COURT SHOULD DENY DISCON'S CONDITIONAL CROSS-PETITION, SINCE REVIEW OF THIS CASE WOULD REQUIRE THE COURT TO RESOLVE COMPLEX ISSUES OF LAW UNDER UNCERTAIN OR SPECULATIVE FACTS.

The Second Circuit's decision in this matter was based principally on the partys' pleadings. Because a complete factual record may reveal unsuspected issues, as well as foreclosing or realigning issues presented based on the facts as they are today presumed, this case is not ripe for Supreme Court review.

The fundamental doctrine of ripeness stresses that cases are not within the Court's jurisdiction unless there are present the "sort of proved or admitted facts that would enable [the Court] to adjudicate [the] claim" presented "in clean cut and concrete form." *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 587-588 (1972) (pointing to "extraordinarily skimpy" factual record and "singularly sparse" factual allegations as factors which render a case unripe for judicial review) *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986) (holding that a case must be vacated and remanded for supplementation of the factual records where the facts necessary to a proper determination were not available).

CONCLUSION

For all the foregoing reasons, Cross-Respondent Bernard O'Reilly respectfully urges this Court to deny the Conditional Cross-Petition of Discon, in accordance with the cited authorities.

Respectfully submitted,

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